
Public Notice



**US Army Corps
of Engineers**
Louisville, Detroit, and
Chicago Districts ®

Public Notice No.
LRL-2016-46-LCL

Open Date:
15 Jul 2016

Clos Date:
15 Aug 2016

Please address all comments and inquiries to:

Mr. Laban C. Lindley

U.S. Army Corps of Engineers, Louisville District

Indianapolis Regulatory Office

8902 Otis Avenue, Suite S106B

Indianapolis, Indiana 46216

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NOTICE OF INTENT TO ESTABLISH A LETTER OF PERMISSION FOR NEW MITIGATION
PROJECTS ASSOCIATED WITH APPROVED COMPENSATORY MITIGATION BANKING AND
IN-LIEU FEE INSTRUMENTS WITHIN THE STATE OF INDIANA

This notice announces the intent to establish a Letter of Permission (LOP) by the Louisville, Detroit, and Chicago Districts U.S. Army Corps of Engineers (the Districts), in accordance with Title 33 CFR 325.5 (b) (2), published in the Federal Register, Volume 51, No. 219, pursuant to Section 10 of the Rivers and Harbors Act of 1899 ("Section 10") and Section 404 ("Section 404") of the Clean Water Act (CWA). The proposed LOP would streamline the approval process, provide additional agency coordination and make the approval of compensatory mitigation projects (CMPs) consistent with the April 10, 2008 "Compensatory Mitigation for Losses of Aquatic Resources" ("Mitigation Rule") (CFR Vol. 73 No. 70, p 19670-19705 (33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; and Pub. L. 108-136). All projects considered for approval under the LOP would be associated with an approved, compensatory Mitigation Bank ("Bank") or In-Lieu Fee ("ILF") Instrument, consistent with the Mitigation Rule ("Rule").

COVERAGE AREA:

All "waters of the United States" (U.S.) in the State of Indiana.

CATEGORIES OF ACTIVITY COVERED BY THE LOP:

The LOP would authorize work in navigable waters and discharges of dredged or fill material into "waters of the U.S." The LOP would authorize all activities performed in association with the enhancement, rehabilitation, establishment, re-establishment, maintenance and repair of CMPs associated with a Corps approved Mitigation Bank or ILF Instrument, including dredging, temporary and permanent work, structures, discharges of dredged or fill material into "waters of the U.S.", the removal of structures, and the removal of fill.

LIMITATIONS:

The project must result in a net increase in aquatic resource functions and services.

MITIGATION:

Projects approved by the LOP would provide consolidated compensatory mitigation associated with an approved Bank or ILF Instrument. No additional mitigation would be anticipated to compensate for the CMPs since they would result in a net increase in aquatic resource functions and services.

RESTRICTIONS:

Projects requiring Department of Army (DA) permits would be authorized under the LOP and would be subject to the attached General Conditions and project-specific Special Conditions necessary to satisfy legal requirements or to otherwise satisfy the public interest requirements, to provide assurances that the CMP is consistent with the Mitigation Rule, and to ensure compliance with the approved Bank or ILF Instrument.

Detailed CMP Concept and Mitigation Plans, consistent with the Mitigation Rule and District Guidance/Standard Operating Procedures (SOP), would be required for project approval under the LOP.

IMPLEMENTATION PROCEDURES:

1. Early Coordination:

(a) The Bank or ILF Sponsor will initiate Early Coordination of the CMPs with the applicable District, the Interagency Review Team (IRT) and the Indiana State Historic Preservation Officer (INSHPO). The IRT consists of representatives of the U.S. Environmental Protection Agency (USEPA), the U.S. Fish and Wildlife Service (USFWS), the Natural Resources Conservation Service (NRCS), and the Indiana Department of Environmental Management (IDEM), and is chaired by the Corps.

Early Coordination will facilitate early screening of CMPs for State critical resources and water quality standards, Federally-listed threatened or endangered species or their critical habitats, and for properties that may be listed or eligible for listing on the National Register of Historic Places (NRHP). This early coordination will ensure compliance with the Section 404(b) (1) Guidelines and General Conditions 5, 15, 17 and 19. If adverse effects may occur to listed species or NRHP-eligible or listed properties, the Sponsor will notify the Corps so

federal consultation may be initiated. Generally, applications shall not be submitted for consideration under the LOP if adverse effects are likely to occur.

Projects to be implemented on State lands must be compliant with State antiquities laws. Coordination with the INSHPO must be initiated prior to the pre-application site visit.

(b) Pre-Application Site Visit: The Sponsor will contact the District, the IRT and the INSHPO to schedule a Pre-Application Site Visit. At the Corps' discretion, other coordinating state and federal agencies may be included. A minimum of 30 days prior to the date of the Pre-Application Visit, the Sponsor will distribute a Concept Plan, consistent with the Rule and District Guidance/SOP, and a jurisdictional determination (JD) to the District, the IRT, the INSHPO and other coordinating agencies, if appropriate. The pre-application site visit will occur within 60 days from receipt of the Concept Plan unless the Corps determines otherwise.

(c) Early Agency Comments: The Corps will accept written comments from the IRT, the INSHPO and other coordinating agencies for a period of 15 days from the date of the Pre-Application Site Visit. Copies of comments which are received during this period will be forwarded by the Corps to the Sponsor for consideration.

2. Complete LOP Application: The Sponsor shall submit a complete DA permit application for CMPs considered under the LOP. The Complete LOP Application shall include: a) an Individual Water Quality Certification, general certification, or waiver, issued by the IDEM, b) a Construction in the Floodway Certificate, issued by the Indiana Department of Natural Resources (IDNR), if applicable, c) a Jurisdictional Determination (JD), d) wetland report (consistent with the Corps 1987 Wetland Delineation Manual and regional supplements), e) stream and/or wetland quality or functional assessment, and f) any correspondence in accordance with the Endangered Species Act and the National Historic Preservation Act. The Complete LOP Application shall also include a complete Project Mitigation Plan, consistent with the Mitigation Rule and District Guidance/SOP, list of adjoining property owners and other items as necessary for the evaluation of the DA application. The Complete LOP Application shall be submitted concurrently to the Corps, the IRT and to other coordinating agencies, if appropriate.

The Corps shall review the Complete LOP Application for compliance with the terms, limitations, and General Conditions of the LOP. Any project that does not comply could not be authorized by this LOP. The Districts would notify the Sponsor and IRT through email following receipt of the Complete LOP Application as to whether the LOP would be applicable. The Districts could, at their discretion, determine that the LOP is not appropriate and require a Standard Individual Permit review of the

proposal.

3. Agency Consultation: Upon determination that the application may be evaluated under the terms and conditions of the LOP, the Corps shall notify the public. The Corps shall also initiate IRT consultation through email notification. IRT consultation shall extend for a period of 30 days. The Corps shall accept written comments during this period.

4. Notification Of Intent to Approve a Project and Dispute Resolution: The Corps shall notify the IRT (via email) of its intent to approve the project, which is considered a modification to the approved Instrument. Dispute resolution shall follow the process outlined in the Mitigation Rule at 332.8(e).

APPLICATION PROCEDURES FOR THE LOP:

Applicants proposing to conduct work under the proposed LOP would have to submit a complete application to the appropriate District and receive written notification that the proposed work is authorized by the LOP prior to the commencement of work in "waters of the U.S." A complete application includes the submittal of the standard DA permit application form ENG 4345, any items deemed necessary by the Districts and the information listed in 1 through 9 below:

1. Name, address, and phone number of the applicant.
2. Location of the proposed work to include latitude and longitude (in decimal degrees) or UTM, named stream (if appropriate), watershed and river basin.
3. Brief description, purpose, dimensions including the size (linear distance and acreage) of the structure or fill area, fill quantity, type of fill being used and any loss of "waters of the U.S."
4. For any project that impacts jurisdictional wetlands, a wetland delineation is required and must conform to the Corps of Engineers' Wetland Delineation Manual, Technical Report Y-87-1, and regional wetland manual supplement. For any site impacting streams, documentation of stream flow regimen and stream quality/function is required.
5. A preliminary jurisdictional determination (JD), unless otherwise specified by the District, is required for all CMPs.
6. A complete Project Mitigation Plan, consistent with the Mitigation Rule and District Guidance/SOP. The complete Project Mitigation Plan must also include:

- a. Design drawings (plan and cross-sections) and stream geomorphological data, if appropriate.
- b. Site protection instrument.
- c. Credit release schedule, if different from the approved Instrument.
- d. Other items as determined by the District.

7. Copies of any letters from the USFWS and the INSHPO (see general conditions 11 and 12) documenting coordination and compliance with the Endangered Species Act and the National Historic Preservation Act. Copies of studies, reports, or other documentation must be included.

8. An Individual Water Quality Certification, general certification, or waiver, issued by the IDEM.

9. A Construction in the Floodway Certification issued by the IDNR, if applicable.

EXCLUDED ACTIVITIES:

1. Activities that are denied any required local, State or Federal authorization.

2. Activities that the District determines to have the potential to cause unacceptable adverse impacts on aquatic resources or to other public interest factors or which do not result in a net aquatic resource benefit. As discussed above, the District may, on a case-by-case basis, require a Standard Individual DA permit.

3. Projects which would result in adverse effects to NRHP-eligible or -listed properties would not generally be approved by this LOP. Such projects would typically be processed under the terms and conditions of an Individual DA Permit.

REVIEW PROCEDURES:

This LOP could not be issued if any legally required Federal, State, or local authorization or certification is denied. The LOP, if otherwise warranted, would not be issued until an Individual Water Quality Certification, general certification, or waiver was on file with the District.

Copies of this notice are being sent to the appropriate Federal and State Fish and Wildlife Agencies. Their views and comments are solicited in accordance with the Fish and Wildlife Coordination Act of 1956.

Operations Division
Regulatory Branch (North)
Public Notice No. LRL-2016-46-LCL

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this LOP. A request for a public hearing must state the specific interest that might be damaged by issuance of the LOP.

The decision whether to issue a LOP will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefits which reasonably may be expected to accrue from the LOP must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposed LOP will be considered; among those are conservation, economics, aesthetic values, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and in general, the needs and welfare of the public. In addition, the evaluation of the impact of the activity on the public interest will include application of the guidelines (40 CFR Part 230) promulgated by the Administrator, United States Environmental Protection Agency, under authority of Section 404(b) of the CWA.

The Corps of Engineers is soliciting comments from the public; Federal, State, and local agencies and officials; Indian tribes; and other interested parties in order to consider and evaluate the impacts of this LOP. Any comments received will be considered by the Corps of Engineers to determine whether to issue, modify, condition or deny this proposed LOP procedure. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects, and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National Environmental Policy Act. Comments are also used to determine the need for a public hearing and to determine the overall public interest of this LOP.

Written statements received in this office on or before the closing date will become a part of the official record and will be considered in the determination on this LOP request. An LOP will be issued unless issuance is found to be contrary to the public interest.

Information pertaining to this LOP is available for public examination during normal business hours upon prior request. All comments regarding this proposal should be addressed to Mr. Laban C. Lindley, at the address noted above and should refer to the Public Notice Number LRL-2016-46-LCL.

If you desire to submit your comments by email, you must comply with the following:

a) In the subject line of your email, type in **ONLY** the Public Notice ID No. LRL-2016-46-LCL.

Operations Division
Regulatory Branch (North)
Public Notice No. LRL-2016-46-LCL

Example:

Subject: LRL-2016-46-LCL

- b) Provide your physical mailing address and telephone number.
- c) Send your email to: lrl.regulatorypubliccomment@usace.army.mil.
- d) If you are sending attachments greater than 1 Mb in size with your email, you must send a hard copy (CD or paper) to the Corps' physical address as well.

GENERAL CONDITIONS:

1. Minimization/Avoidance: Discharges of dredged or fill material into waters of the U.S. must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site). In determining the minimal impact threshold, the Districts will consider the direct and secondary impacts of the fill or work and any mitigation measures.

2. Erosion and Sedimentation Controls: The permittee shall ensure that sedimentation and soil erosion control measures are in place prior to any construction activity. This shall include the installation of straw bale barriers, silt fencing and/or other approved methods to control sedimentation and erosion. All controls must be used and maintained in effective operating condition during construction. Sedimentation and erosion controls will not be placed in "waters of the U.S.", except if specifically approved by the District. Work shall not be performed within waters of the United States during periods of high flow. The permittee shall ensure that areas disturbed by any construction activity, including channel banks, are immediately stabilized and revegetated with a combination of non-invasive grasses, legumes and shrubs compatible to the affected area and that will not compete with native vegetation.

3. Navigation: No activity authorized by the LOP may cause more than a minimal adverse effect on navigation. Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

4. Aquatic Life: No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

5. Spawning Areas: Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or

downstream smothering by substantial turbidity) of an important spawning area are not authorized.

6. Suitable Materials: No activity, including structures and work in waters of the U.S. or discharges of dredged or fill material, may use unsuitable material such as but not limited to: auto bodies, tires, garbage or debris, scrap lumber, metal refuse, roofing materials, asphalt or other bituminous material, broken concrete containing asphalt, or any material which would cause water pollution as defined by the Indiana Department of Environmental Management.

7. Water Supply Intakes: The permittee shall not perform any work under the LOP where the discharge of dredged and/or fill material will occur in the proximity of a public water supply intake.

8. Safety of Impoundment Structures: To ensure that all impoundment structures are safely designed, the District Engineer may require non-federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons, i.e., a licensed engineer. The District Engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

9. Adverse Effects from Impoundments: If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

10. Management of Water Flows: To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

11. Fills Within 100-Year Floodplains: The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

12. Equipment: All construction equipment shall be refueled and maintained on an upland site away from existing streams, drainage ways and wetland areas. Heavy equipment working in wetlands must be placed on mats, or other measures taken to minimize soil disturbance.

13. Removal of Temporary Fills: Temporary fills must be removed in their entirety and the affected areas returned to pre-construction conditions (i.e., elevation, contours, re-establishment of vegetation, etc.).

14. Proper Maintenance: Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and

compliance with applicable general conditions, as well as any activity-specific conditions added by the District Engineer to an LOP authorization.

15. Endangered Species: The permittee shall not perform any work under the LOP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. The permittee shall notify the District Engineer if any listed species or critical habitat might be affected or is in the vicinity of the project, and shall not begin work under the LOP until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. As a result of formal or informal consultation with the USFWS the District Engineer may add species-specific endangered species conditions to the LOP. Authorization of an activity under the LOP does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, the ESA prohibits any person subject to the jurisdiction of the United States to take listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the USFWS or their webpages on the Internet.

Obligations under Section 7 of the Act must be reconsidered by the Districts if (1) new information reveals impacts of the proposed action may affect listed species or critical habitat in a manner not previously considered, (2) the proposed action is subsequently modified to include activities which were not considered during consultation, or (3) new species are listed or critical habitat designated that might be affected by the proposed action.

16. Migratory Birds and Bald and Golden Eagles: The permittee is responsible for obtaining any "take" permits required under the USFWS' regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The permittee should contact the appropriate local office of the USFWS to determine if such "take" permits are required for a particular activity. Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

17. Historic Properties: The permittee shall not perform any activity under the LOP which may affect historic properties listed, or eligible

for listing, in the National Register of Historic Places until the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. The permittee must notify the District Engineer if the activity authorized by the LOP may affect any historic properties listed, determined to be eligible or which the permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin construction until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the IDNR, Division of Historic Preservation and Archaeology. If the permittee discovers any previously unknown historic or archaeological remains while accomplishing the activity authorized by the RGP, work must be immediately stopped and the Corps immediately notified. The District will initiate the Federal, tribal and State coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

18. Wild and Scenic Rivers: The permittee shall not perform any work within any Wild and Scenic Rivers or in any river officially designated as a "study river" for possible inclusion in the system, unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity authorized by the LOP will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal Land Management agency in the area (e.g. U.S. Forest Service, Bureau of Land Management, the National Parks Service, or the U.S. Fish and Wildlife Service).

19. Water Quality: The permittee must comply with any case specific special conditions added by the Corps or by the State Section 401 Water Quality Certification (WQC). The conditions imposed in the State Section 401 WQC are also conditions of this LOP.

20. Access: Representatives from the Corps of Engineers and/or IDEM may inspect any authorized activity or mitigation site at any time deemed necessary to ensure compliance with the terms and conditions of the LOP, Section 401 WQC, and applicable laws.

21. Construction Period: All work authorized by this LOP must be completed within three years after the date of the Corps authorization letter, unless otherwise authorized by the Corps. If you find you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least three months before the expiration date.

22. Reporting: The permittee, after completion of work under the LOP, shall submit a signed certification letter regarding the completed work and required mitigation, if applicable. The certification letter will include a statement that the work was done in accordance with the LOP authorization including compliance with all general and special conditions and completion of mitigation work.

LOP Implementation Process

